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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 919

HATTIEBELLE O. SIMONSON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF MAX L. DRUXMAN, BANKRUPT, PETITIONER

v.

R. C. GRANQUIST, DISTRICT DIRECTOR OF THE INTERNAL REVENUE SERVICE

RICHARD D. HARRIS, TRUSTEE FOR ALASKA TELEPHONE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

I

Section 57j of the Bankruptcy Act provides that debts "owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed" (with an exception not here applicable) as provable claims. Each of these cases

presents the question whether this provision applies to bar the allowance in bankruptcy of a secured claim by the United States for penalties on federal taxes, on which a lien had arisen prior to bankruptcy. The court of appeals, following its prior decision that Section 57j does not apply to secured claims (*In re Knox-Powell-Stockton Co.*, 100 F. 2d 979, 983–984), held that the district court had properly allowed the United States a lien claim against the bankrupt estate for such penalties.

As the court of appeals recognized (Pet. 15), its decision on this issue is in conflict with *United States* v. *Harrington*, 269 F. 2d 719 (C.A. 4) and *United States* v. *Phillips*, 267 F. 2d 374 (C.A. 5). On the other hand, the Sixth and the Tenth Circuits are in accord with the decision below.[1] The question is an important one in the administration of the Internal Revenue laws.[2] The Chief Counsel of the Internal Revenue Service has advised us that there are 3,397 cases pending under the Bankruptcy Act involving lien claims for penalties on federal taxes, which total $2,580,571.79. In view of the conflict and the importance of the question, the government does not oppose certiorari on this issue (the second question pre-

[1] *Commonwealth of Kentucky* v. *Farmers Bank & Trust Co.*, 139 F. 2d 266 (C.A. 6); *Grimland* v. *United States*, 206 F. 2d 599 (C.A. 10); *United States* v. *Mighell*, 273 F. 2d 682, 684 (C.A. 10); see *Laughorn* v. *Carter*, 19 Cal. 2d 454, 121 P. 2d 738.

[2] The question is also important in the administration of state and local tax laws, since Section 57j covers debts due both to the United States and to states and subdivisions thereof. Indeed, the penalties involved in the *Knox-Powell* and *Commonwealth of Kentucky* cases (text and note 1, *supra*) arose out of state taxes.

II

sented in *Simonson*, and the only question in *Harris*).

Although the tax lien in *Simonson* arose before the petition in bankruptcy was filed, notice of such lien was not filed until after the petition. Section 70c of the Bankruptcy Act provides that the trustee shall be deemed vested, as of the date of bankruptcy, with all the rights, remedies and powers of a judicial lien creditor, whether or not such creditor actually exists. Section 6323(a) of the Internal Revenue Code of 1954 provides that a federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor unless notice thereof has been filed * * *." The petitioner in the *Simonson* case (the trustee in bankruptcy) contends that the effect of these two provisions taken together is to give him the status of a "judgment creditor," and hence to invalidate, as against him, a federal tax lien as to which notice had not been filed prior to bankruptcy.

We submit that the court of appeals correctly rejected this contention, and that further review of this question is unwarranted.

Both this Court and the lower federal courts have consistently interpreted Section 6323(a) of the 1954 Code, and the predecessor provision of the 1939 Code (Section 3672(a)), as using the terms judgment creditor, purchaser, mortgagee, and pledgee, in their "usual, conventional sense" (*United States* v. *Gilbert Associates*, 345 U.S. 361, 364). Under these standards, a "judgment creditor" within the meaning of these provisions is someone holding a judgment of a court

of record, and a "purchaser" is someone who has acquired title for a valuable consideration in the manner of vendor and vendee. *United States* v. *Gilbert Associates*, 345 U.S. 361, 364 (judgment creditor); concurring opinion of Mr. Justice Jackson in *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 52 (judgment creditor); *United States* v. *Scovil*, 348 U.S. 218, 221 (purchaser); *United States* v. *Ball Construction Co.*, 355 U.S. 587 (mortgagee); United *States* v. *Hawkins*, 228 F. 2d 517 (C.A. 9) (purchaser); *New York Terminal Warehouse Co.* v. *Bullington*, 213 F. 2d 340, 344 (C.A. 5) (purchaser); *United States* v. *Chapman*, 281 F. 2d 862, 868-869 (C.A. 10) (purchaser); *National Refining Co.* v. *United States*, 160 F. 2d 951, 955 (C.A. 8) (purchaser). See S. Rep. No. 1622, 83d Cong., 2d Sess., p. 575.

Applying these settled principles, every lower federal court that has considered the question has held that the provision in Section 70c of the Bankruptcy Act giving the trustee the status of a hypothetical judicial lien creditor does not make him a "judgment creditor" within the meaning of Section 6323(a) of the 1954 Code or its 1939 Code predecessor. *United States* v. *England*, 226 F. 2d 205 (C.A. 9); *Brust* v. *Sturr*, 237 F. 2d 135 (C. A. 2); *Matter of Fidelity Tube Corp.*, 278 F. 2d 776 (C.A. 3), certiorari denied, *sub nom. Borough of East Newark* v. *United States*, 364 U.S. 828; *In re Taylorcraft Aviation Corp.*, 168 F. 2d 808, 810 (C.A. 6); *In the Matter of Green*,

124 F. Supp. 481 (N.D. Ala.); *In re Ann Arbor Brewing Co.*, 110 F. Supp. 111, 115–116 (E.D. Mich.).[1] This line of authority is correct. Section 70c is intended to enable a trustee readily to marshal the assets of the estate, not to avoid a concededly valid tax lien against the bankrupt through invocation of a recording statute designed primarily to protect certain third parties without notice. The Court recently denied certiorari where the identical question was presented (*Borough of East Newark* v. *United States*, 364 U.S. 828). There is no greater reason for review of this issue in the present case.

Respectfully submitted.

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MAY 1961.

[1] Prior to *Gilbert Associates*, the Second Circuit, although giving the federal tax lien priority over the trustee's claim on another ground, had ruled that a trustee in bankruptcy was a "judgment creditor" under Section 3672 of the 1939 Code. *United States* v. *Sands*, 174 F. 2d 384, 385. Subsequent to *Gilbert Associates*, and in reliance thereon, the Second Circuit reached the contrary conclusion in *Brust* v. *Stutz*, *supra*, p. 126, and in effect overruled its *Sands* decision.